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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1032

RANDOLPH PHILLIPS,

Petitioner,

-against-

JOHN D. MURCHISON,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	8
Relevant Statutes	9
Statement of the Case	10
Reasons for Granting the Writ	
I.	24
II.	27
III.	40
IV.	42
V.	44
VI.	55
VII.	56
VIII.	61
Conclusion	66
Appendix A	1a
Appendix B	46a
Appendix C	57a

Citations

Cases	Page
Alleghany Corp. v. Kirby, et al., 218 F. Supp. 164; 333 F. 2d 327	17, 58
Campbell v. New York Evening Post, 245 N. Y. 320	19, 30, 32
Cowley v. Pulsifer, 137 Mass. 392	27 et seq.
Curtis Publishing Co. v. Butts, 388 U. S. 130	47, 55
Dorr v. United States, 195 U. S. 138	40, 41
Freeman v. Kirby, 27 F. R. D. 395	16, 33
Holt v. Kirby, 384 U. S. 28	5
Hanson v. Krehbiel, 68 Kan. 670	49
Holden v. Pioneer Broadcasting Co., 365 P. 2d 845	42
J. I. Case v. Borak, 377 U. S. 426	61, 64
Lee v. Brooklyn Union Publishing Co., 209 N. Y. 245	44
Linn v. Plant Guard Workers, 383 U. S. 53	56, 57

Lewis v. The Chemical Foundation, Inc., 262 N. Y. 489 — 33, 50, 51

Murray v. Brancato, 290 N. Y. 52 — 59, 60

New York Times Co. v. Sullivan, 376 U. S. 254 — 57

Oglesby v. Cranwell, 250 App. Div. 720 — 30, 33, 50

Park v. Detroit Free Press, 72 Mich. 560 — 42, 47

Post Publishing Co. v. Butler, 137 F. 725 — 48, 36

Pennekamp v. Florida, 328 U. S. 331 — 24, 25

Rosenblatt v. Baer, 383 U. S. 75 — 25, 44, 46

Sanford v. Boston Herald, 318 Mass. 156 — 31

Time, Inc. v. Hill, 385 U. S. 374 — 26, 55

Constiutional Provisions Involved:

First Amendment 8

Fifth Amendment 8

Fourteenth Amendment 8

Relevant Statutes

New York Civil Rights Law, §74 (formerly § 337 New York Civil Practice Act) 9

Securities Exchange Act of 1934, 48 Stat. 895 9

Sec. 14(a) 9

Rule X-14a-9 9

Other Authorities

Gatley, Libel & Slander (1960) 11, 41

Odgers, Libel & Slander (1929) 59, 60

Record citations

The complaint is printed at 5a-45a in Appellant's Appendix and the citation with a page number followed by small "a" refers to that volume for the complaint; otherwise it refers to the opinions of the courts below bound with this petition. Nine copies of the Appellant's Appendix are being filed with the petition.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit insofar as said judgment affirmed the dismissal by the District Court of counts 3 through 11 and 13 & 14 of the complaint.

OPINIONS BELOW

The opinion of the Court of Appeals is appended as Appendix A hereafter (1a) and is reported at 383 F. 2d 370 (2 Cir. 1967). The first opinion of the District Court is appended as Appendix B(46a) and is not reported. The second opinion of the District Court is appended as Appendix C (57a) and is reported at 252 F. Supp. 513 (DCNY 1966).

JURISDICTION

The judgment sought to be reviewed was dated August 23, 1967 and entered on October 20, 1967 (18a), a petition for rehearing being denied on October 19, 1967 by order of that date (20a). Jurisdiction is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Does the Constitution permit unequal "due process of law" protection against defamatory falsehood among the residents of the 50 States, so that in some or all of 43 States a federal or State court defendant is protected against a plaintiff's sending his false, malicious and defamatory pleadings to the newspapers by denying the plaintiff any defense of "privilege" under the rule of Cowley v. Pulsifer, (1884), 137 Mass. 392

(Holmes, J.), while the law of New York as applied by the courts below denies such protection to a federal court defendant as well as any remedy for the publication of the defamatory falsehood?* Which is the correct rule under the Fifth and Fourteenth Amendments to the Constitution of the United States? Insofar as such abuse is of the process of a federal court, is this not a federal question to be decided by "due process" standards and not by the standards of a State "privilege" statute?

2. Does the Constitution permit the degree of protected "freedom of speech" to vary from State to State so that respondent is immune from liability for publication throughout the Nation of his false, malicious and defamatory allegations in 3 civil complaints because the publications originated in New York, but respondent would not be so protected if his publications throughout the Nation originated in some or all of the 43 other States ? Which is the correct Constitutional rule ?

* The statistic as to the number of States is derived from Gatley Libel & Slander (1960), p. 297, and notes 2 & 3.

3. Where respondent, as a part of his proxy contest for control of a public corporation regulated by the Securities and Exchange Commission under the Securities Exchange Act of 1934,

(i) caused Nationwide publication of charges of petitioner's "fraud upon the Courts", "corrupt bargain" and "conspiracy" in three civil complaints; and

(ii) the complaint in one of the actions is struck from the files of the District Court as being in violation of Rule 11, F. R. C. P. which prohibits the filing of "sham and false" pleadings, and as filed by "phantom plaintiffs" without knowledge of their contents whose attorney has been paid for by respondent herein (Freeman v. Kirby et al., 27 F. R. D. 395); and

(iii) a second complaint is ruled res judicata on the same duplicated issues (Freeman v. Kirby et al., NY S. Ct., N. Y. Co., Index No. 13114/1960); and

(iv) the third complaint is alleged to have been unauthorized by the plaintiff in whose name its first count is filed and which charged petitioner with "fraud on the Courts", "corrupt bargain" and "conspiracy", and after substitution of a corporate plaintiff and trial on the merits is

found to be "completely and utterly" failing in proof (Alleghany Corporation v. Kirby et al., 218 F. Supp. 164, 187); * and where

(v) the court below held that with respect to "the publication of the contents of (the) various complaints to various news media... New York's Civil Rights Law § 74," which prohibits any action being maintained against any person for "a fair and true report of a judicial proceeding", "is a good defense to such a situation."; and where

(vi) the court below affirmed the District Court's ruling that the "fair and true report" standard of § 74 did not require respondent, as a condition of being accorded its "privilege" against suit, to make any publication, and respondent failed to make any publication of "a fair and true report" of plaintiff's vindication in the same "judicial proceeding",

has petitioner been deprived of "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt * * * as a basic of our Constitutional system" (Rosenblatt v. Baer, 383 U. S. 75, 86, 92) by the action of the courts below in so construing both §§14(a) and 27 of the Securities Exchange Act and § 74 of New York's Civil Rights Law as to deny him any remedy?

* One aspect of this case not involving petitioner was appealed. (333 F. 2d 327; 384 U. S. 28).

4. Since "malicious utterance of defamatory statements in any form cannot be condoned" and "malicious libel enjoys no constitutional protection in any context" (Linn v. Plant Guard Workers, 383 U. S. 53, 63), did the district court err in holding that the "privilege" to publish "a fair and true report of any judicial proceeding" under Sec. 74, NYCRL was not defeasible by proof of "actual malice" or of "reckless disregard for the truth" (Rosenblatt v. Baer, 383 U. S. 75; Linn, supra; New York Times Co. v. Sullivan, 376 U. S. 254 ?

5. Do the facts as alleged in the 14 counts of the complaint and as re-alleged in their totality in count 14 meet this Court's test of "actual malice" or "reckless disregard of the truth" ?

6. If so, would not the same principles that give a "public official" or a "public figure" a right of action for libel under such circumstances apply to a private person ?

7. Is not the denial of any remedy for publication of defamatory falsehood a deprivation of "due process of law" within the meaning of the Constitution by reason of petitioner having suffered an injury recognized by the law without any available redress?

8. In respect of counts 8 and 13 of the complaint, based on violation of Rule X-14a-9, promulgated by the Securities and Exchange Commission under § 14(a) of the Securities Exchange Act of 1934, which prohibits the circulation of "false and misleading statements" in corporate proxy contests, was the district

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On January 15, 1968 this Court granted the petition for writ of certiorari in No. 517, Amant v. Thompson, a libel action in which the issue of "actual malice" appears to be related to similar issues in this action.

Borak, 377 U. S. 425 because "insofar as these counts may relate to alleged defamation, his right of recovery is protected in the other (libel) counts of the complaint." ? May a second district judge then dismiss the libel counts without reinstating the Securities Exchange Act counts ? May the Court of Appeals thereafter affirm the dismissal of the Securities Exchange Act counts without giving any reason therefor ? Is this not a denial of its duty to this Court to make clear

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7. Is not the denial of any remedy for publication of defamatory falsehood a deprivation of "due process of law" within the meaning of the Constitution by reason of petitioner having suffered an injury recognized by the law without any available redress?

8. In respect of counts 8 and 13 of the complaint, based on violation of Rule X-14a-9, promulgated by the Securities and Exchange Commission under § 14(a) of the Securities Exchange Act of 1934, which prohibits the circulation of "false and misleading statements" in corporate proxy contests, was the district court correct in finding that "plaintiff has alleged no facts sufficient to show any damage resulting to him personally by reason thereof" when the complaint in fact re-alleged the statements in the final omnibus claim (count 14) and further alleged they were part of "a continuing conspiracy... maliciously to defame plaintiff", "injured him in his reputation", "deprived him of earnings" and caused "plaintiff's appointment" as "consultant" to be terminated" ?

9. May a district court deny a plaintiff a private right of action for violation of Rule X-14a-9 under the Securities Exchange Act of 1934, as upheld by this Court in J. I. Case v. Borak, 377 U. S. 425 because "Insofar as these counts may relate to alleged defamation, his right of recovery is protected in the other (libel) counts of the complaint." ? May a second district judge then dismiss the libel counts without reinstating the Securities Exchange Act counts ? May the Court of Appeals thereafter affirm the dismissal of the Securities Exchange Act counts without giving any reason therefor ? Is this not a denial of its duty to this Court to make clear

its reasons for its actions, not to mention its duty to appellant, and to the bar which must be guided by its precedents?

10. In affirming dismissal of the malicious prosecution and malicious abuse of process claims and the libel claims alleged in count 14, which re-alleged all the facts in the prior counts, did the court below correctly apply the law of New York and of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law * * * abridging the freedom of speech, or of the press;"

Amendment V

" * * * nor shall any person * * * be deprived of * * * property, without due process of law;"

Amendment XIV

" * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Relevant Statutes

SECTION 337 OF THE NEW YORK CIVIL PRACTICE ACT

"A civil action cannot be maintained against any person, firm or corporation for the publication of a fair and true report of any judicial proceeding, legislative proceedings, or other official proceeding or for any heading of the report which is a fair and true headnote of the statement published." (now Section 74 C. R. L.)

SECTION 14 OF THE SECURITIES EXCHANGE ACT OF 1934

"Sec. 14.(a) It shall be unlawful for any person by the use of the mails * * * or otherwise to solicit any proxy * * * in respect of any security * * * registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." (15 USCA 78n) (48 Stat. 895)

RULE X-14A-9 OF REGULATION X-14 UNDER SECURITIES EXCHANGE ACT OF 1934

"No solicitation subject to this regulation shall be made by means of any proxy statement * * * or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading * * *." (17 C. F. R. § 240.14a-9)*

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* Includes "(b) Material which... impugns personal reputation, or makes charges (of) illegal conduct... without factual foundation." 17 C. F. R. § 240.14a-9, note. (Our emphasis)

Statement of the Case

The defamatory publications

As Judge Ryan stated in his opinion (57a):

"No question is presented as to the defamatory nature of the statements pleaded in the complaint.[2]

"[2] In short, and bluntly put, it is charged that for a price, Phillips sold out to Kirby and betrayed the interests of those he purported to represent, in advocating the acceptance of a separate settlement with Kirby for $1,100,000 when he knew the latter's liability in the lawsuits had been evaluated at $35,000,000, and that the sum of $1,100,000 was considerably less than Kirby would have had to pay in settlement except for the alleged corrupt conduct; that the conspiracy encompassed the lifting of the injunction of this Court, as well as the entry of an order of dismissal as to Kirby, which were achieved by the concealment of his alleged duplicitous conduct from both courts.' *Murchison* v. *Kirby*, 27 F. R. D. 14, 17 (1961)." (61a)

In paragraph 55 of his Answer to the Amended and Supplemental Complaint (R. 334) defendant "Admits that on or after September 8, 1960, Hill & Knowlton, Inc., acting on behalf of defendants, issued from its New York City office a written statement, a copy of which is annexed as Exhibit B to the Complaint . . ." The statement is headed: "For: Murchison Brothers For IMMEDIATE RELEASE: THURSDAY, SEPTEMBER 8, 1960."* It states:

* Defendant admits in the affidavit of press agent Richard Cheney appended to his moving papers that the press release was distributed "to the financial editors of the New York metropolitan

"John D. Murchison, Clint W. Murchison, Jr. and Gerard L. Fossland today (September 8) charged Allan P. Kirby, Charles T. Ireland, Jr. and other Alleghany Corporation directors, as well as Randolph Phillips, with conspiracy to defraud the U. S. District Court, the New York Supreme Court, and Alleghany Corporation.

The complaint, filed in the U. S. Southern District Court, alleges that Kirby, Phillips and Ireland agreed to a secret arrangement to reward Phillips with a directorship in Investors Diversified Services for helping Kirby get rid of his liabilities through a separate settlement of a series of lawsuits brought in behalf of Alleghany Corporation.

The complaint charges that Kirby, using Phillips, negotiated a secret settlement to suits brought by Alleghany shareholders, after Kirby was informed by his counsel that his liability in such suits might run in excess of $35,000,000. It also alleges that Kirby was influenced by the fact that certain stockholders of Alleghany (other than the Murchisons) were accumulating Alleghany shares in contemplation of a proxy contest for control of the holding company.

The complaint alleges that Phillips agreed to settlement in the suits in return for: 'a position of prominence as a director or officer of I. D. S., Alleghany or one of its affiliates;' (Phillips is now a director of I. D. S.) 'a substantial voice in the management and

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dailies, the Daily News, Times, Herald Tribune, Daily Mirror, Post, Journal American, World-Telegram & Sun and the Wall Street Journal, to the wire services (UPI and AP) and to the PR news wire." He also admits that the press release was "prepared" *prior* to the filing of the complaint (R. 451, 492, 493) (77a-78a).

operation of I. D. S. and Alleghany;' and a job as 'a salaried consultant to Alleghany or one of its affiliates.' (Phillips is now on the payroll of I. D. S. as a consultant at $2,500 monthly.)"

All the defamatory publications complained of included some or all of the above statements (70a-73a).

Paragraph 55, which is repleaded under the 9th Count, alleges the issuance of the above press release "to newspapers and wire services in the State of New York and elsewhere in the United States, and to individuals in the State of New York and elsewhere in the United States, through the use of the mails and otherwise." (19a-22a)*

Appellant's unpublicized "vindication"

The action *Murchison* v. *Kirby,* which was the subject of Judge Weinfeld's decision (27 F. R. D. 14) above quoted, became *Alleghany Corporation* v. *Kirby,* 218 F. Supp. 164. Final judgment dismissing this action as to appellant Phillips was entered on June 5, 1963. As Judge Moore stated in giving the background of that part of the action which continued against defendant Allan P. Kirby on a claim not alleged against Phillips:

"The district court found that appellant had failed completely to establish any fraud in which Kirby and Phillips were involved in connection with the ultimate settlement. No appeal has been taken from this finding." *Alleghany Corporation* v. *Kirby,* 333 F. 2d 327.

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* "Of course the delivery of the release to the newspapermen was publication in and of itself." *Munafo* v. *Helfand,* SDNY, 140 F. Supp. 234, 237-8. (Weinfeld, *J.*)

Paragraph 78 of the Amended & Supplemental Complaint herein alleges:

> "78. At no time did defendants herein cause a press release to be issued publicizing this decision (218 F. Supp. 164) of this Court, nor communicating the decision of this Court to those newspapers which had reprinted defendants' press release." (25a)

Defendant John D. Murchison in his Answer admits the allegations of paragraph 78 as follows:

> "78. Admits the allegations of paragraph 78 of the Complaint, but denies the implication that defendant was under any duty to perform any of the acts alleged." (R. 330)

The Amended & Supplemental Complaint **(5a)(R. 261-297)**

Counts 1, 2 & 3 allege that the acts complained of constituted a conspiracy maliciously to use the process of the court, or to abuse its process, and maliciously to violate Rule 11 of the Federal Rules of Civil Procedure in the institution and prosecution of *Freeman* v. *Kirby*, 27 F. R. D. 395 and *Alleghany Corporation* v. *Kirby*, 218 F. Supp. 164 insofar as they related to Randolph Phillips, plaintiff-appellant herein, who was a defendant in both actions as well as in a duplicate *Freeman* action in the State court. (5a-11a)

Counts 4 & 5 allege that draft complaints against Phillips in the names of "phantom plaintiffs"—one "Klafter" in the 4th Count and an unidentified person alleging the First Count of a so-called "Murchison complaint—constituted libelous publications by the defendants John D.

Murchison and his brother Clint W. through their attorneys to one Jesse Holland. (11a-12a)

Sixth Count. The facts alleged in this Count show (a) the publication to a printer of the complaint set forth in "the printer's proof of a draft complaint, dated September 1, 1960" in *Murchison* v. *Kirby*, 60 Civil 3511 (par. 7 realleged in par. 35). This is "the printer's proof of the Murchison complaint" referred to by Judge Bicks in *Freeman* v. *Kirby*, 27 F. R. D. at 397); (b) the filing of a *printed* complaint in the Court on September 8, 1960 in 60 Civil 3511 (par. 7 realleged in par. 35); and (c) the utterance of a slander to and the publication in the Wall Street Journal of a libel on September 7th and 8th, 1960. (R. 51-53) (13a-15a)

Seventh Count. The facts alleged in this Count are the same as for the Sixth except publication was made in The New York Herald Tribune, on September 7th and 8th, 1960. (pp. 10-12) (R. 53-55) (15a-18a)

Eighth & Thirteenth Counts. These allege defamations by publication of a 2-page "press release" dated September 8, 1960 (18a-21a) and a 17-page leaflet dated March 17, 1961 (30a) in violation of SEC rules. (29a-31a)

Ninth Count. This alleges the publication of a defamatory press release "throughout the United States" on September 8, 1960. (pars. 67, 68, 71). (R. 60-61) (22a-25a)

Tenth Count. Alleges publication in The New York Times and The New York World-Telegram on September 9, 1960. (par. 31) (25a)

Eleventh Count. Alleges publication in the Minneapolis Morning Tribune of September 9, 1960. (pars. 86, 89). (R. 64-65) (26a-28a)

Twelfth Count. This alleges a defamation by the publication of certain paragraphs in the *Murchison* v. *Kirby* complaint, SDNY, 60 Civil 3511 on or about September 13, 1960 in Minnesota, Ohio, Illinois, Delaware and Canada to 14 named individuals residing in those places. (pars. 92 and 93) (R. 65-66) (28a-30a)

Fourteenth Count. Realleges all prior counts as a conspiracy. (31a)

The proceedings in the District Court

The complaint was filed on February 27, 1961. Jurisdiction was asserted by reason of diversity of citizenship and as to counts 8, 13 and 14 under the Securities Exchange Act of 1934. (48 Stat. 895). On January 28, 1964, after the trial and dismissal of Alleghany Corporation v. Allan P. Kirby, Randolph Phillips et ano., 218 F. Supp. 164, an amended and supplemental complaint was filed alleging petitioner's vindication therein, among other matters.

On February 17, 1964 respondent moved for dismissal under Rule 41(b), F. R. C. P. or in the alternative for dismissal of some of the 14 counts for failure to state a claim upon which relief can be granted. On May 8, 1964 Judge Dawson granted the motion to the extent of dismissing for failure to state a claim counts 1, 2, 3, 4, 5, 8, 13 & 14 and denied the motion as to counts 6, 7, 9, 10, 11 & 12. (46a-56a)

On November 2, 1965 respondent moved for summary judgment under Rule 56(b), F. R. C. P. dismissing counts 6, 7, 9, 10, 11 & 12. Judge Ryan granted the motion in all respects on March 28, 1966. Final judgment dismissing the complaint was filed and entered the same day.

The proceedings in the Court of Appeals

By opinion filed August 24, 1967 the Court of Appeals (per Waterman, C. J. and Feinberg, C. J., Moore, C. J. dissenting) reversed the judgment below dismissing counts 1, 2 & 12. In affirming the dismissal of the remaining counts the court was unanimous.

On October 19, 1967 the court denied petitioner's petition for rehearing, having previously denied appellee's petition for rehearing en banc.

The prior adjudications that the Freeman complaints were "sham and false" and filed by "phantom plaintiffs", striking the federal complaint for violation of Rule 11, F. R. C. P.

The federal decision to that effect is reported in Freeman v. Allan P. Kirby, Randolph Phillips et ano., 27 F. R. D. 395 (SDNY 1961).

The dismissal of the duplicate State Freeman complaint on the grounds that 27 F. R. D. 395 made the issues on the merits and as to "sham and false" res judicata is not reported but was made by order dated August 7, 1964 (R. 500)

Murchison's complicity in these matters by his attorneys was therein adjudicated. 27 F. R. D. at 396-398. The attorney Holland who signed the "sham and false" pleadings and found the "phantom plaintiffs" (Id.) was paid $30,000 by Murchison. (R. 429)

The prior adjudication that the defamatory publications by the Murchisons and their attorney Holland were "apparently intended to affect the voting in the proxy contest for control of the (Alleghany) Corporation."

As stated by the late Judge Dawson in Alleghany Corporation v. Kirby et al. (formerly Fossland, Murchison v. Kirby et al.), 218 F. Supp. 164: *

* Judge Dawson found that with respect to the allegations concerning petitioner that plaintiff "has failed completely to establish" the alleged "fraud on the court", "corrupt bargain" and "conspiracy." (218 F. Supp. at 182)

"• • • Although brought as a suit in equity, it appears to be but another skirmish in the battle of tycoons (the Murchison Brothers of Texas on one side, and Allan P. Kirby of New Jersey on the other) for control of a rich plum—Alleghany Corporation. With the advantage of great wealth on both sides, and the logistical support of battalions of lawyers and squads of publicity men, the parties have ranged around the country using to the full the broad discovery processes of the Federal Rules. Over 20,000 pages of pre-trial depositions were taken . . .

"• • • It is interesting that the action was started almost coincidentally with the institution of a proxy fight by the Messrs. Murchison against Mr. Kirby for control of Alleghany Corporation, and the filing of the suit was hailed with a great flurry of publicity apparently intended to affect the voting in the proxy contest for control of the corporation. The proxy fight was successful . . ." (218 F. Supp. 164, 167)

The District Court's affirmed ruling on "malice"

" The question of malice, a true question of fact, does not defeat the privilege; its resolution therefore even if pleaded is not necessary to an application of the privilege (Kelley v. Hearst Corp., 2 A. D. 2d 480, 157 N. Y. S. 2d 498; Farrell v. New York Evening Post, 167 Misc. 412, 3 N. Y. S. 2d 1018 (Sup. Ct. N. Y. Co. 1938))." (70a)

The District Court's affirmed ruling that the "privilege" attaches once the complaint has been either "served" or "filed"

" It cannot be disputed (and plaintiff conceded this) that an action of the nature here involved is commenced in the New York State court by the service of the summons upon any one defendant, and in the Federal court "[a] civil action is commenced by filing a complaint with the court." (Rule 3 F. R. Civ. P.). The filing of the complaint in the *Freeman* suit in the State Court, and the service of a defendant with process in the Murchison suit in the Federal court is not required in the establishment of the pendency of a judicial proceeding. Once the pendency of the judicial proceedings has been established the privilege attaches irrespective of whether the proceedings were public knowledge or known to plaintiff. (Campbell v. New York Evening Post, 245 N. Y. 320, 157 N. E. 153, 52 A. L. R. 1432)." (64a)

The District Court's affirmed ruling that respondent's failure to report petitioner's vindication did not make the privilege of printing the defamatory pleadings defeasible.

"Plaintiff's other argument is that the privilege is defeasible because defendant failed to publish his subsequent vindication, and that the report therefore was not full, fair or impartial.

The report here was co-extensive with the judicial proceeding—only the complaints were then in existence and that is what was reported. It was as complete as could be and that is when the privilege attached, not years later; it was not destroyed because the charges ultimately were not sustained. Dismissal of the charges did not render the charges in the complaint non-existent as a record in a judicial proceeding. George v. Time, Inc., supra; Campbell v. New York Evening Post, supra. There is no principle of law which so eradicates the privilege which has attached because of subsequent events." (74a-75a)

The District Court's affirmed ruling that the "privilege" applies to a party who circulates his own complaint.

"Plaintiff finally urges that the privilege does not apply to the Murchison action because the publication was by Murchison a party to the complaint. But, the statute immunizes "any person" including parties to the litigation (Lewis v. Chemical Foundation, 262 N. Y. 489, 188 N. E. 33; Robinson v. Battle, 148 App. Div. 230, 133 N. Y. S. 57; Oglesby v. Cranwell, 250 A. D. 720, 293 N. Y. S. 67)." **(75a)**

The District Court's affirmed ruling that no claim was stated under Sec. 14(a) and 27 of the Securities Exchange Act of 1934, which prohibits the solicitation of proxies by means of "false and misleading statements". (Rule X-14a-9)

"*Alleged Violations of the Securities Act* *

Counts 8 and 13 appear to claim damages for violations of the Securities Act, although it is difficult to ascertain from a reading of the complaint exactly what the contentions of the plaintiff are with reference to these counts. Insofar as these counts may relate to alleged defamation, his right of recovery is protected in the other counts of the complaint. Insofar as the counts may allege violations of the Securities Act, or the rules and regulations thereunder, plaintiff has alleged no facts sufficient to show any damage resulting to him personally by reason thereof. The meetings of stockholders concerning which proxies were solicited have been held. He did not seek to enjoin the use of the proxies or to enjoin the holding of the meetings or the action taken thereat. For him to wait and now seek personal damages for alleged violations of the Securities Act is not justified. If there were any violation of the proxy rules, such violation cannot be said to be related in any way to the damages sought to be recovered by the plaintiff. *Cf., Mills* v. *Sarjem Corporation,* 133 F. Supp. 753, at p. 768 (D. C. N. J. 1955).

The motion to dismiss counts 8 and 13 of the complaint for failure to state a cause of action is granted.

So ordered." (55a-56a)

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* Counts 8 and 13 are not alleged under the Securities Act but under the Securities Exchange Act of 1934. (R. 261, pars. 54 & 96)

The decisions of the Court of Appeals and District Court are singular for failure to cite a single one of the 1964-1967 libel decisions of this Court nor to discuss or apply J. I. Case v. Borak, 377 U. S. 425 (1963) which upheld a private right of action for violation of the S. E. C. proxy rules under the Securities Exchange Act of 1934.

Petitioner cited to the Court of Appeals all of the cases on libel in this Court from 1964-1967. (Reply brief, pp. 1-11, 29-30)

He also brief in extenso the application of Borak to the facts herein. (Id., pp. 1-11)

Yet the court below failed to articulate a single reason for not applying these cases to the facts before it.

As petitioner shows hereafter these cases are controlling and require reversal of the judgment dismissing counts 3 through 11 and 13-14.

REASONS FOR GRANTING THE WRIT

I.

The rule adopted by the court below permits the degree of protected "freedom of speech" to vary from State to State so that respondent is immune from liability for publication throughout the Nation of his false, malicious and defamatory allegations in 3 civil complaints because the publications originated in New York, but a similar respondent would not be so protected if his publications throughout the Nation originated in some or all of the 43 other States. Pennekamp v. Florida, 328 U. S. 331 requires that the writ be granted so that :

"The standards that set the scope of its principles cannot therefore be such that 'the constitutional limits of free expression in the Nation would vary with State lines.' (Rosenblatt v. Baer, 383 U.S. 75, 84 citing Pennekamp.

As we show hereafter, as a result of the decision below, the degree of protected "freedom of speech" varies from State to State in the following respects:

(i) in New York and 6 other States a defamer is protected by "privilege" if he sends his pleadings to the newspapers prior to any action by the court thereon. In some or all of the 43 other States he is denied such protection.

(ii) in New York a defamer's freedom, including a newspaper's, to report the derogatory parts of a judicial proceeding is not conditioned upon his making a subsequent report of "the further proceedings which vindicate the person defamed." In a memorandum below, respondent conceded this "may have been the rule in some, or even a majority of American jurisdictions, but it is not the rule in New York." We have been unable to find a single case in

which this rule has been abolished in other jurisdictions.

(iii) in New York the "absolute privilege" to make "a fair and true report of a judicial proceeding" is not defeasible by proof of malice, according to the district court, as affirmed by the court below. This not only varies with the rule in most other jurisdictions, but appears to conflict with this Court's rule that "malicious utterance of defamatory statements in any form cannot be condoned" and "malicious libel enjoys no constitutional protection in any context." (Linn v. Plant Guard Workers, 383 U. S. 53, 63).

(iv) in New York a defamer in the guise of making "a fair and true report" of "a judicial proceeding" is granted the "absolute privilege" of circulating the defamatory falsehoods in his complaint. Yet

> "This Court has never held that the press has an absolute privilege to publish falsity." (Time, Inc. v. Hill, 385 U. S. 374, 410, note 8, Opinion of Harlan, J.)

These variations in the degree of protected "free expression" are so substantial as to require that pursuant to Pennekamp the writ be granted so that the protected area of "free expression" may be made uniform throughout the Nation.

II.

Mr. Justice Holmes in Cowley v. Pulsifer (1884), 137 Mass. 392, stated: "It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing a statement of claim in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity." (p. 394) "A contempt of court cannot be privileged and we see no reason to doubt that an action could be maintained for such a publication" citing English Chancery " 'if the party publish his bill abroad, the said bill being false.'" (p. 396). Most of the 50 States follow this rule. (Gatley, Libel & Slander, p. 297, notes 2 & 3)

Respondent stated in the court below in response to petitioner's reliance on Cowley:

> "First. * * * Cowley was decided on the ground that the pleadings which were reported were 'not open to the public.' (137 Mass. at 396). The contrary is true here.
>
> Second. * * * Gately on Libel & Slander * * * does state that publication of pleadings in a newspaper will be 'treat(ed) as a contempt of court'. If that were all Gately said on the subject, we would be obliged to point out that Gately is a treatise on English not New York libel law. But, the Gately book itself (footnote 67, p. 174 takes the trouble to refer the American readers to page 297 where it is stated that the English rule is not followed in New York, California, Kentucky, Nebraska, Oregon, South Carolina and Wisconsin. (Op. Ct. p. 297 fn. 2)"(Appellee's Brief, pp. 26-27)

Thus respondent confirms that some or all of the 43 other States do not follow the New York rule. Here also the Freeman complaints were not "open to the public" at the time of the publication of their defamatory falsehoods, and respondent only showed "service" of them and no "filing" prior to publication. (62a) Conversely with respect to the Fossland-Murchison complaint filed in the district court he merely

showed that "he filed the complaint in this Court on September 8, 1960 sometime before 4:30 P. M." (62a) whereupon the "press release" immediately issued all over the Nation. There was no showing below that this "filed" complaint was "open to the public" at the time of publication; indeed it would have been clerically impossible for it to go through the routine of the clerk's office and thereafter transmitted to the public docket file in such a matter of minutes as occurred here. It was also shown that no "service" of the complaint had been made prior to publication (62a). Thus the Murchison complaint was not even "open to" the public inspection of the defamed petitioner and due to the lateness of filing could not have been inspected even by him until the next day.

But petitioner presses the attention of this Court not upon these technical issues, but to the substantive "due process" and "equal protection" guarantees that underlie the Cowley v. Pulsifer rule, and which now have been destroyed by the courts below without even a discussion in their opinions of the issue.

Neither this Court nor New York's highest court has ever passed on this issue. But admittedly "disregarding the overwhelming weight

of authority elsewhere" New York has ruled that a newspaper, as distinct from a party plaintiff, is privileged under § 337 New York Civil Practice Act (now § 74 New York Civil Rights Law) to publish the pleading "on the ground that the filing of a pleading is a public and official act in the course of judicial proceedings." Campbell v. New York Evening Post, 245 N. Y. 320, 328 (1927). The rationale of the Court was:

> "We cannot go back and exclude the publication of daily reports of trials before a final decision is reached." (p. 328)

The courts below refused to apply the Cowley v. Pulsifer rule and did not regard the issue as one of according petitioner "fair play" which "is the essence of due process" Galvin v. Press, 347 U. S. 522, 530, although it seems indisputable that Constitutional "due process" was at the root of Mr. Justice Holmes' reasoning in Cowley. Instead the court below found that "New York Civil Rights Law § 74 is a good defense to such a situation. Lewis v. The Chemical Foundation, Inc., 262 N. Y. 489 (1933); Oglesby v. Cranwell, 250 App. Div. 720, 293 N. Y. Supp. 67 (2d Dep't 1937)." (A-6)

The States of Michigan, Minnesota, Iowa, Massachusetts, Rhode Island, Colorado, and Pennsylvania are among the jurisdictions that follow the Cowley v. Pulsifer rule.

Without exhausting the citations to this effect, we list Nixon v. Dispatch Publishing Co. (1907), 101 Minn. 309, 112 N. W. 258; a jurisdiction where one of the libels complained of herein was published. (26a-27a); Sanford v. Boston Herald (1945), 318 Mass. 156, 61 N. E. 2d 5; Pittsburgh Courier Publishing Co. v. Luhore (1952), 200 F. 2d 355 and cases cited; Park v. Detroit Free Press, (1888), 72 Michigan 560; Isley v. Sentinel Co. (1907), 133 Wisconsin 20; Flues v. New Non-Pareil Co. (1912), 155 Iowa 290; and Meeker v. Post Printing Co. (1913), 55 Colorado 355.

These cases show that not even a newspaper is given the "privilege" of reporting merely a pleading filed by one party. A fortiori these jurisdictions do not give the "privilege" to a plaintiff whose self-publication serves no public policy purpose but in Mr. Justice Holmes' words is not "a suf-

ficient foundation...for scattering any libel broadcast with impunity." (137 Mass. at p. 394)

In none of the 6 States that apparently follow the rule in Campbell v. New York Evening Post, 245 N.Y. 320 (1927) is there a reported case extending it to a self-publicizing plaintiff's report of his own defamatory complaint.

The States that follow the Campbell rule, according to Gatley, supra, p. 297, note 2, are limited to California, Kentucky, Nebraska, Oregon, South Carolina and Wisconsin.

Petitioner has been unable to find a single reported case outside the case below that extends the Campbell rule to letting a "party publish his bill abroad, the said bill being false." (137 Mass. at p. 396).

Thus if the present case is based on a correct exposition of New York law by the court below, it is a unique law that is not followed in any other jurisdiction. *

* Gatley in *Libel & Slander* (1960) states "he (a litigant) is not privileged if he sends his pleading to a newspaper for publication" and loses thereby both his "absolute" and "qualified" privilege (note 67, p. 174). His publication is "a contempt of court". *Gaskell & Chambers* v. *Hudson* (1936), 2 K. B. 595, 603-604. " 'A contempt of court cannot be privileged'. Cowley v. Pulsifer, 137 Mass. 392." *Stevenson* v. *News Syndicate Co.*, 276 App. Div. 614, aff'd 302 N. Y. 81 (1950).

Neither of the two cases cited by the court below as its authority raised the Constitutional "due process" issue, nor came within the facts of the Cowley v. Pulsifer rule.

In neither Lewis v. The Chemical Foundation, Inc., 262 N. Y. 489, nor Oglesby v. Cranwell, 250 App. Div. 720 was there an adjudication, as here, that the defamatory matter was "sham and false" (Freeman v. Allan P. Kirby, Randolph Phillips et ano., 27 F. R. D. 395 (DCNY 1961); nor "completely and utterly" failing in proof (Alleghany Corporation v. Allan P. Kirby, Randolph Phillips et ano., 218 F. Supp. 164, 187). *

Thus falsity, an indispensable ingredient of the Cowley v. Pulsifer rule (137 Mass. at 396), was in effect ruled beside the point by the lower court's reliance on Lewis and Oglesby.

* Two years after publication of the defamatory matter the complaint was amended to substitute Alleghany Corporation for the Fossland-Murchison plaintiffs (218 F. Supp. at 167). Thereafter, upon dismissal, an appeal of one aspect of this case not involving petitioner was taken. (333 F. 2d 327; 384 U. S. 28)

The decision below fails to shows that Lewis related to a party who "merely republished the 'fair and true report')of testimony given in court "by mailing copies of the newspaper" story thereof "to many persons." * Williams v. Williams, 27 App. Div. 550 (2d Dep't 1966). In Oglesby, there was no adjudication that the allegations in the complaint were false - an essential element in the application of the Cowley v. Pulsifer rule (137 Mass. at p. 396). In addition, the defendant there, unlike the duty imposed on respondent here by the court below, or rather lack of duty, was required to show that in writing a story of his fraud complaint for the newspapers he had acted "in good faith and without malice." Williams, supra.

Finally, and most importantly, neither of these two cases relied upon by the court below raised as petitioner did below the "gut" issue of Constitutional "due process."

* The defendant also pleaded that he acted "without actual malice" and this plea was held "good as against a motion to strike out, even though the report is published through the efforts or at the suggestion of pleader." Lewis v. The Chemical Foundation, Inc., 262 N. Y. 489". Oglesby, 250 App. Div. 720.

The Cowley v. Pulsifer rule is rooted in the strong ground of both substantive and procedural "due process" as guaranteed by the Fifth and Fourteenth Amendments while the New York rule, if correctly expounded by the court below, deprives petitioner and all future litigants who may be the victims of defamatory falsehood in a complaint that is published by the plaintiff, of both substantive and procedural "due process" as guaranteed by the Fifth and Fourteenth Amendments, and no consideration of public policy or welfare is served by such an extension of "privilege" to make "a fair and full report of a judicial proceeding".

Privilege statutes have uniformly been enacted to serve the public purpose of the First Amendment guaranty of a free press and to encourage justice to be performed in the daylight so as to insure its fairness.

Neither of these urgencies apply to the publication by a private person of his own complaint's defamatory falsehoods prior to the time a court has acted upon them or even, as here, received the defendant's answer.

What public policy or constitutional imperative or reason of justice can support such a policy of premature disclosure of defamatory falsehood? And then immunize the act from all liability? Clearly Mr. Justice Holmes was right in refusing to countenance such a rule.

Cowley v. Pulsifer by upholding a right of action in such circumstances was upholding the Fifth Amendment's guaranty of "due process", a guaranty that accords to every man a remedy for a legal injury. "A man is entitled under the Constitution to a trial by jury, but he may waive it. So he is entitled to a remedy at law for an injury to his reputation..." Post Publishing Co. v. Butler, 137 F. 725, 727, and cases cited. Holden v. Pioneer Broadcasting Co., 365 P. 2d 845 (Oregon, 1961) (pp. 855-857 and cases cited. *

* See Mr. Justice Stewart's statement in Rosenblatt v. Baer, 383 U.S. at p. 92 that "The right of a man to the protection of his own reputation from unjustified invasion" is "a basic of our Constitutional system."

And Cowley v. Pulsifer upholds the procedural decencies by not allowing the "due process" of either a federal or State court to be the vehicle for "scattering any libel broadcast with impunity." Certainly an abuse of that "process" is an abuse of the "due process" whose protection is guaranteed under the Fifth and Fourteenth Amendments to every party plaintiff and defendant in either a federal or State court.

Yet the courts below without even vouchsafing their reasoning have refused to follow Cowley v. Pulsifer, apparently under the misconception that there is merely at issue herein a traditional Erie v. Tompkins problem of State law. But as we show hereinafter there is not a single case under New York law that denies a cause of action for a defamatory falsehood's publication by a self-publicizing plaintiff's circulation of the charges in his own complaint. In the single case relied on by the Court below where a plaintiff sent his pleadings to a newspaper, the decision merely held that he had a good defense if he could prove he acted in good faith and without malice. At that point there had of course been no adjudication of falsehood. (Oglesby v. Cranwell, 250 App. Div. 720, 293 N. Y. Supp. 67 (2d Dep't 1937).

The sole answer of respondent to these issues in the court below, and the one that we must assume was persuasive in view of the court's silence thereon, was

> " * * * It has long been established that reputation is not 'property' protectable under the Constitution. Abbott v. National Bank of Commerce, 175 U. S. 409, 414 (1899) * * *
>
> In any event, the short answer * * * is found in American Wells Works Co. v. Layne & Bowler Co., 241 U. S. 257, 260 (1916).
>
> > 'The state is master of the whole matter, and if it saw fit to do away with actions of this type (defamation) altogether, no one, we imagine, would suppose that they still could be maintained under the * * * laws of the United States.'"

Mr. Justice Stewart has given the answer to Abbott in Rosenblatt v. Baer, supra, "The right of a man to the protection of his own reputation from unjustified invasion" is "a basic of our Constitutional system." (383 U. S. at p. 92). The "short answer" to American Wells Works is that New York has not done away with libel actions and thus must decide them pursuant to Constitutional standards.

Whether the rule of the majority of the States who protect a federal and State court defendant against a plaintiff's sending his false and defamatory pleadings to the newspapers by denying him "privilege", or the rule of New York as now expounded by the courts below which denies such protection to a federal or State court defendant, is the correct rule is a question of importance under the Fifth and Fourteenth Amendments to the Constitution that has not been decided but should be decided by this Court.

We assume, arguendo, that Dorr v. United States, 195 U. S. 138, 151-152, as quoted, infra, did not decide the basic issues herein. If it did, summary reversal on that authority of the courts' dismissal below of the libel counts would be justified.

III.

The failure of respondent "after reporting derogatory parts" of a judicial proceeding "to publish the further proceedings which vindicate(d)" petitioner requires a court to deny the plea of "privilege" in the publication of the defamation. Restatement of the Law, Torts, § 611 (1938 ed.); Dorr v. United States, 195 U. S. 138, 151-152.

In Dorr this Court stated:

"The privilege extends to a full and fair report of judicial proceedings without prejudicial comment. The rule is nowhere better stated than by Judge Cooley in his work on Constitutional Limitations, 7th ed., p. 637: '* * * But it is said that if *a party* is to be allowed to publish what passes in a court of justice, *he must publish the whole case,* and not merely state the conclusion which he himself draws from the evidence.'" (Our emphasis)* (pp. 151-152)

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* Petitioner has been unable to find any other case where a court has ruled that "a fair and true report" does not require publication of the defamed person's vindication if the defamation has been published.

Restatement of the Law, Torts states at § 611 (1938 ed.):

"*Reports of Judicial* * * * *Proceedings*

"* * * * However when a newspaper publishes from day to day the report of a judicial proceeding, *it may not* after reporting derogatory parts, *fail to publish the further proceedings which vindicate the person defamed.*" (Our emphasis) (p. 295)*

In the courts below respondent claimed the Restatement rule "may have been the rule in some, or even a majority of American jurisdictions, but it is not the rule in New York." If this is so, then the New York rule does not conform to the standards for a privileged "full and fair report of judicial proceedings" stated by this Court in Dorr, supra.

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* *Restatement of the Law, Torts, Second,* preliminary draft dated April 22, 1960, pp. 84-85, proposes no change in this provision of §611. Nor does Tentative Draft No. 12, dated April 27, 1966, pp. 118-119 where the Reporter notes that proposed revisions of §§606-618 should "await a number of questions left unanswered by the case of *New York Times Co.* v. *Sullivan* (1964), 376 U. S. 254." He thereafter mentions questions under §§607, 608, 609 and 610. At no point is the above statement in §611 indicated as open to question.

Gatley on *Libel & Slander,* the most modern British text, states:

"§514. * * * A report which accurately sets out one part of the proceedings and omits another which gives a different complexion to the whole case will not be privileged. Turner v. Sullivan (1862), 6 L. T. (n. s.) at p. 131" (p. 289).

IV.

At least 8 States have declared unconstitutional under the "due process" and "equal protection of the law" guarantees of the Fifth and Fourteenth Amendments statutes that deny general damages for defamation, because they allow an injury without effective remedy for the wrong done a defamed person.

> "The constitutionality of (retraction) statutes * * * has been passed upon in other states. In a majority of the cases in which the question has been raised the courts have held, or stated in dicta, that the denial of the remedy of general damages for defamation is unconstitutional." *Holden* v. *Pioneer Broadcasting Co.*, 365 P. 2d 845 (Oregon, 1961). (pp. 855-857)

Holden cites *Byers* v. *Meridian Publishing Co.*, 84 Ohio St. 408, 95 N. E. 917, and the landmark cases of *Hanson* v. *Krehbiel,* 68 Kan. 670, 75 P. 1041, 64 L. R. A. 790, 104 Am. St. Rep. 422; *Park* v. *Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544, approved in *McGee* v. *Baumgartner,* 121 Mich. 287, 80 N. W. 21, 22. Other jurisdictions by divided courts have held that statutes permitting the publication of a retraction in place of

general damages and allowing only special damages satisfy "due process" and "equal protection" by giving an adequate legal remedy for the injury. *Werner* v. *So. Calif. Assoc. Newspapers,* 216 P. 2d 825, 35 Cal. 2d 121. (1950). At least four other jurisdictions to save constitutionality judicially rewrote such statutes "to include general damages". *Werner* at 839 citing *Osborn* v. *Leach,* 135 N. C. 628, 47 S. E. 811, 815, and *Meyerle* v. *Pioneer Pub. Co.,* 45 N. D. 568, 178 N. W. 792, 795; *Holden,* supra, at 855-857 citing *Comer* v. *Age Herald Pub. Co.,* 151 Ala. 613, 40 So. 673; and *Ellis* v. *Brockton Pub. Co.,* 198 Mass. 538, 84 N. E. 1018.

Here the defamation was spread without "retraction" and by acknowledgement of Murchison's press agent "to the financial editors of the New York metropolitan dailies, the Daily News, Times, Herald Tribune, Daily Mirror, Post, Journal American, World-Telegram & Sun and the Wall Street Journal, to the wire services (UPI and AP) and to the PR news wire". (77a-78a) *A fortiori,* under the law of the above cases, if a "retraction" statute is constitutional because it affords a "substitute" for "general damages" and also allows "special damages" or is unconstitutional because it is not an adequate legal remedy, Section 337, N. Y. C. P. A. has been given an unconstitutional application by Judge Ryan since plaintiff here has not had the benefit either of a statutory suit for "retraction" or "general" or "special" damages.*

It was error for the Court of Appeals in these circumstances to affirm Judge Ryan's application of New York law.

V.

The lower courts' application of New York law violates the "due process" and "equal protection" guaranties of the Fourteenth Amendment to the Constitution.

As this Court stated in Rosenblatt v. Baer, 383 U. S. 75 (1966) "the scope of the privilege is to be determined by reference to the function it serves." (p. 84, note 10).

The scope of the statute is "a fair and true report of a judicial proceeding." He was required, if he made any report at all, to make it full, fair and impartial..." Lee v. Brooklyn Union Publishing Co., 209 N. Y. 245, 249-250." But while no authority controls us, the tendency of our courts is to restrict the rule of absolute privilege rather than extend it." Pecue v. West, 233 N. Y. 316, 321. "The privilege established * * * for reports of judicial proceedings embraces only 'full, fair and impartial' reports of such proceedings." Stevenson v. News Syndicate Co., 302 N. Y. 81, 88 (Emphasis supplied).

It is admitted that respondent made no report of petitioner's vindication in the same judicial proceedings which served as the basis for the defamatory publications. (74a). The

district court ruled that New York law did not require such publication. (74a-75a), and the Court of Appeals was silent on the issue. Petitioner submits that such a report was required under the "due process" and "equal protection of the law" guarantees. "Fair play ...is the essence of due process." Galvan v. Press, 347 U.S. 522, 530.

The "function" of the statute is to encourage a "full, fair and impartial" and a "true" report "of a judicial proceeding." That function is plainly impaired if the report, as here, is neither "full" nor "fair" nor "impartial. Under the Restatement rule, supra, and Dorr, supra, neither of these standards were met when respondent curtailed his "report" of the judicial proceedings and failed to report his victim's judicial vindication.

None of New York's courts have ever passed upon the question of whether a "full, fair and impartial" report can omit publication of the defamed person's vindication if the "privilege" is to be applied. Judge Ryan cited no case to support his ruling, but announced "There is no principle of law which so eradicates the privilege which has attached because of subsequent events." (74a-75a). The Court of Appeals was silent on the issue. The "principle of law" however which "eradicates the privilege", if after publishing the defamatory falsehood the party omits to publish the judicial vindication in the same proceeding reported upon, is the

principle of "Fair play" which "is the essence of due process." Galvan v. Press, 347 U.S. at 530, and which underlies Dorr and the Restatement rule. A statute that encourages only publication of the defamation and not of the vindication thereafter is obviously deficient in affording "the equal protection" of its law to both plaintiff and defendant in a litigation.

And certainly under the "due process" clause it is the duty of a federal court to protect its process so that it is not made the vehicle for "spreading any libel broadcast with impunity." (137 Mass. at 394).

As to substantive "due process" it must be clear that a rule of law which deprives a person of his reputation by Nationwide publicizing of defamatory falsehood, that provides no compulsory retraction statute, no compulsion upon the defamer to publicize his victim's vindication, and no damages or remedy of any kind is a rule of law that conflicts with "a basic of our Constitutional system." Rosenblatt v. Baer, 383 U.S. 75, 86, 92; in which this Court stated:

> "This conclusion does not ignore the important social values which underlie the law of defamation. Society has a strong and pervasive interest in preventing and redressing attacks upon reputation..." (p. 86)

Mr. Justice Stewart in concurring stated:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our Constitutional system." (383 U.S. at 92) *

And numerous State courts had earlier shown their accord with this doctrine. Thus the high court of Michigan stated in Park v. Detroit Free Press Co., 72 Mich. 560:

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* In Curtis Publishing Co. v. Butts, 388 U.S. 130, Mr. Justice Harlan speaking for himself and three other members of the Court was led

> "to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard..." (p. 155)

"There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization." (40 N. W. 731, 733)

In Meyerle v. Pioneer Publishing Co., 45 ND 568, the State's high court said:

"These damages (to a person's reputation) are in the nature of a property right; they have been said to constitute property. See 17 CJ 710, 829, 841. See Newell on Libel and Slander, p. 841; Pratt v. Pioneer Press Co., 35 Minn. 251, 28 NW 708; Cruikshank v. Bennett, 30 Misc. 232, 62 NYS 118; Adams v. Scott, 33 SD 194, 145 NW 446; 17 RCL 430, 431; Osborn v. Leach, 135 N. C. 628."

In Post Publishing Co. v. Butler, 137 F. 725, the court stated:

" * * * The right to general or compensatory damages is taken away. And yet such right is the very essence of the remedy by an action for libel, and such damages usually the only ones recoverable. In most cases it is almost

impossible to show any pecuniary loss by reason of the libel... Thus the statute virtually destroys the right to recover for an injury to one's standing and reputation alone. A statute somewhat similar to this before the Supreme Court of Minnesota in Allen v. Pioneer Press Co., 40 Minn. 117... was sustained seemingly because of the mandatory provision for a retraction. Similar enactments in Michigan, Kansas and North Carolina have been held unconstitutional. Park v. Free Press Co., 72 Mich. 560 ... Hanson v. Krehbiel, 63 Kan. 670... Osborn v. Leach, 135 N. C. 628.

* * * A man is entitled under the Constitution to a trial by jury, but he may waive it. So he is entitled to a remedy at law for an injury to his reputation ..." (p. 727) *

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* No member of this Court seems to have disagreed with Mr. Justice Stewart's statement in Rosenblatt, supra, that "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt " is entitled to recognition by this Court "as a basic of our Constitutional system." Petitioner may be wrong but he does not read the absolutist position of Justices Black and Douglas as expressing denial of this right.

"The best available current authority on New York law" on the construction of its "privilege" statute is that "any person" may publish "a fair and true report" by "disinterested outsiders" "of a judicial proceeding" but that if a plaintiff publishes his own pleading he must prove that "the publication was in good faith and without malice" and that if the publication was made "to accomplish an improper, collateral purpose" it is a "misuse of legal process" or "a cognizable tort for which the law will provide a remedy." Lewis v. The Chemical Foundation, 262 N. Y. 439 (1933); Oglesby v. Cranwell, 250 App. Div. 720 (2d Dept. 1937); 237 N. Y. 384 ( ); Hauser v. Bartow, 273 N. Y. 370, 373-374; ( ); Dean v. Kochendorfer, 237 N. Y. 384 ( ).

The court below misapplied New York law.

The latest New York decision, which was relied upon by the court below in other respects for reversing the dismissal of three counts of the complaint, shows that the court below in affirming dismissal of the libel counts on the above grounds misapplied the New York law. Thus Williams v. Williams, 27 App. Div. 2d 550 (2d Dept. 1966) which the court below termed "the best available current authority on New York law" distinguished the very cases cited by the court below as its authority as not properly applied in a case where a plaintiff published his own complaint and "there was never any 'fair and true report' of the defamatory action by disinterested outsiders..." (p.) *

"Defendants cite Lewis v. The Chemical Foundation (262 N. Y. 439) and Oglesby v. Cranwell (250 App. Div. 720) as authority for the contention that their publication of the defamatory complaint was privileged,

* In addition for this ground based on the construction of the statute, the Appellate Division ruled the complaint sufficiently pleaded a non-privileged claim because "the primary and sole publication of it (the complaint)" was "by defendant's maliciously mailing to numerous persons in the trade, of the complaint which defendant Williams had himself induced." "solely for the purpose of ruining plaintiff's business reputation". (p. 550)

In Lewis, the primary publication of the slanderous statements made in a judicial proceeding was a story in a newspaper. That publication was, of course, a privileged 'fair and true report' of a judicial proceeding; and the slanderer (the defendant in the Lewis action) merely republished the 'fair and true report' in the newspaper by mailing copies of the newspaper to many persons. Far different is the case at bar, where there was never any 'fair and true report' of the defamatory action by disinterested outsiders, but only the primary and sole publication of it, by defendants' malicious mailing to numerous persons in the trade, of the complaint which defendant Williams himself had induced. (Emphasis supplied)

Oglesby (supra) was a motion to strike out several defenses pleaded in the answer. ...defendant had brought a fraud action against the plaintiff and then had written a newspaper story describing the fraud action. Pleading the defense of privilege the defendant alleged that the newspaper story was a fair and true report of a judicial proceeding, published in good faith, without malice and with reasonable cause to believe the public was interested in the facts. We held that this defense was sufficient as a matter of pleading, primarily because of the allegation that the publication was in good faith and without malice." (Williams, supra, p.)

Thus neither of the only two cases cited by the court below for affirming without trial dismissal of the libel counts in the complaint upholds the practices pleaded in this case nor denies in any respect the sufficiency of the complaint. Here there is no publication at issue which was made by "a disinterested outsider" as in Lewis. Here the publications complained of are: (1) oral communications to newspapers by respondent's own attorney (Holland) who the record shows was paid $30,000 by respondent Murchison (R. 429) for obtaining two "phantom plaintiffs" to plead the charges of "fraud upon the Courts", "corrupt bargain" and "conspiracy" and whose complaint was struck from the files of the District Court for violation of Rule 11, F. R. C. P. which prohibits the filing of "sham and false" pleadings (Freeman v. Kirby et al., 27 F. R. D. 395); and (2) a "press release" of a public relations firm publicizing a pleading that the complaint herein alleges to have been unauthorized by the plaintiff in whose name its first count was filed and which made the charges of "fraud" etc. (23a, pars. 69 & 70). Insofar as these charges are stated in the "press release" to have also been alleged by John D. Murchison and Clint W. Murchison, Jr. (44a) as well as "dummy" plaintiff Gerard L. Fossland - all of whom realleged them in the second count - they still were not made by "a disinterested outsider". In addition, as Judge Dawson noted, the charges were filed "coincidentally with the institution of a proxy fight by Messrs. Murchison against Mr. Kirby" and the "great flurry of publicity (was) appar-

ently intended to affect the voting in the proxy contest for control of the corporation. The proxy fight was successful." Alleghany Corporation v. Allan P. Kirby, Randolph Phillips et ano., 218 F. Supp. 164, 167.

The striking of one complaint as "sham and false" in violation of Rule 11, F. R. C. P., the use of a "dummy" plaintiff in another to allege the crucial first count - because the Murchisons not being shareholders at the time of the fraudulent acts complained of had no standing to sue thereon (Rule 23(b)(1), F. R. C. P.) - and the "great flurry of publicity" for proxy fight purposes would seem as a matter of law impossible to reconcile with the "good faith" required in Oglesby, not to mention the difficulty of reconciling such facts with proof of lack of "malice".

Furthermore, the use of the "press release" for proxy fight publicity without prior filing with the S. E. C. (21a, par. 61), as required by Rule X-14A-11(c)(1) of Regulation X-14 under the Securities Exchange Act of 1934, manifestly shows that the process of the federal court was "misused" because it sought "to accomplish an improper collateral purpose.", namely the use of the complaint to provide a base for unfiled proxy soliciting publicity.

Thus, leaving aside, all questions under the Fifth and Fourteenth Amendments, it seems clear that the court below decided these important questions in a way in conflict with the applicable state law.

VI.

The courts below failed to interpret New York law pursuant to Art. 1, §8 of the Constitution of the State which gives a right of action "for the abuse of the right" of freedom of speech and of the press.* There is no New York case that exculpates false, malicious and defamatory publication by a party of his own pleadings. And "This Court has never held that the press has an absolute privilege to publish falsity." (Time, Inc. v. Hill, 385 U. S. at 410, note 8 (Harlan, J.). "For 'the recognition of a privilege does not mean that it is without conditions or exceptions'" (Bridges v. California, 314 U. S. at 282.)

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* Art. 1 states: "Every citizen may speak freely and publish his sentiments on all subjects, being responsible for the abuse of the right." Thus there are no "absolute privileges" cognizable under the Constitution of New York.

We suggest that the effect of the decision below is for all practical purposes to choke-off a defamed defendant's access to the community of readers who read his defamation unless a defamer is required as a condition of his privilege to publicize to the same community of readers his victim's vindication. This follows from the fact that the defamer often alone knows the full extent of the circulation of the defamation, and in a city where there is only one newspaper and the newspaper prints only the defamation and not the vindication the victim has no "freedom of the press." Only the rule of law petitioned for herein guarantees him that freedom.

And that rule of law is not a new rule, but merely the rule of Dorr, supra, and the Restatement, Torts, § 611, supra.

VII.

The Court below erred in not construing the "absolute privilege" of New York Civil Rights Law § 74 defeasible by proof of "malice", since "malicious utterance of defamatory statements in any form cannot be condoned" and "malicious libel enjoys no constitutional protection

in any context." (Linn v. Plant Guard Workers, 383 U. S. 53, 63). (N.Y.Constit., Art. 1, Sec. 8)

Although this standard was cited to the court below it remained silent on the issue, as it did on all the other Constitutional issues.

This Court has made abundantly clear that both a "public official" and a "public figure" should not be deprived of a right of action for libel if the defamatory statement was made with "actual malice" or in "reckless disregard of the truth". New York Times Co. v. Sullivan, 376 U. S. 254; Curtis Publishing Co. v. Butts, 388 U. S. 130. In fact it would seem, in the words of Chief Justice Warren, that "slipshod and sketchy investigatory techniques" or in Mr. Justice Harlan's words that "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" is enough to deny any privilege for publication of defamatory falsehood. (388 U. S. at 155, 169)

Here there is already an ajudication that two of the complaints that were the basis for defamatory and false publications were

"sham and false" and filed by "phantom plaintiffs", namely the Freeman federal and state court complaints (p. 4, supra). And the Fossland-Murchison complaint is alleged to have been unauthorized by the plaintiff Fossland in whose name its first count was filed and which charged petitioner with "fraud on the Courts", "corrupt bargain" and "conspiracy" (p. 11, supra). The complaint also alleges that "Freeman, Fossland and Manaster" were "induced and stimulated...to lend their names" as plaintiffs "in violation of the Canons of Professional Ethics of the American Bar Association" and that after trial on the merits Murchison's attorney Carter admitted there was no 'direct evidence' of the 'fraud' (218 F. Supp. at 176), despite his prior affidavit that "during his entire career as a lawyer he had never 'spent greater time assuring myself of the existence of direct proof of the essential allegations of the complaint as I did prior to its signing.'" (27 F. R. D. 14, 19). Yet on trial the court found that he had "completely and utterly" failed to establish any proof of the "fraud". (R. 261-297, pars. 77, 104 (b) and (c)). (218 F. Supp. at 187)

Clearly these allegations meet the test of "actual malice" or "reckless disregard of the truth." Yet in violation of the doctrine of Linn the court below, by affirming the dismissal "condoned" and gave "constitutional protection" to respondent's malice.

New York's highest court has expressed "doubt whether the omission of the express qualification of the privilege was intended to change the common law rule of liability where there is proof of 'actual malice'." (Murray v. Brancato, 290 N. Y. 52, 59.

In so stating the court said: "See discussion of the effect of similar omission in the analogous English statute. (Odgers, Libel & Slander, 267, 268) 290 N. Y. at 59. The statement in Odgers reads:

> "Fair and accurate reports of judicial proceedings whether published in a newspaper or not, were already privileged at common law; and we cannot believe that this section creates any absolute privilege- a privilege, that is, which is not destroyed by clear proof of express malice. There is no public interest which requires that such an absolute immunity should be extended to newspaper reports. Nor will such an immunity be inferred from the

mere absence of the words which are to be found in the next section: 'unless it shall be proved that such report was published maliciously.'" (Emphasis supplied) (Odgers, 1929 ed., p. 268)

New York's highest court nor any appellate division, so far as we have been able to find, has had an opportunity to pass upon this issue since the 1964-1967 libel decisions of this Court.

The decision of the district court herein was based on 2 cases (p. 18, supra). The Farrell case was decided 5 years before Murray v. Brancato. And the Kelly case cites 2 New York Court of Appeals' cases and an appellate division case (Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers, 260 N. Y. 106; Lewis v. The Chemical Foundation, 262 N. Y. 489; Oglesby v. Cranwell, 250 App. Div. 720), all of which show the rentention of the "actual malice" rule.

Clearly no high court in New York has squarely decided the issue. If it has, the 1964-1967 libel decisions of this Court in effect overrule on Constitutional grounds the right of defamation with "actual malice" of "reckless disregard of the truth."

VIII.

In denying petitioner a right of action under the Securities Exchange Act of 1934, the District Court, as affirmed without comment, by the Court of Appeals, decided the question in conflict with the decision of this Court in J. I. Case v. Borak, 377 U. S. 425 (1963).

The courts below played "ducks and drakes" with this claim of petitioner in counts 8, 13 & 14.

The ruling of Judge Dawson is quoted in full at p. 22, supra. Although professing difficulty in understanding what counts 8 & 13 were contending, the learned judge misquoted them as being under the Securities Act when in fact they are unmistakably alleged under "the Securities Exchange Act of 1934, 15 U. S. C. A. 78 et seq." (R. 261 at pars. 54 and 96). (19a, 29a)

Having placed them under the wrong statute, the judge then stated "Insofar as these counts may relate to alleged defamation, his right of recovery is protected in the other (libel) counts of the complaint." (55a). Thereafter Judge Ryan dismissed the libel counts without reinstating the Securities Exchange Act counts.

The Court of Appeals thereafter affirmed the dismissal of the counts without giving any reason therefor. Petitioner thereupon filed an application for correction of opinion and for extension of time to file petition for rehearing. Therein he stated:

> "In support of this application appellant respectfully refers this Court to the following statement in the Per Curiam opinion: 'We of the majority are in complete agreement with the position taken by our brother Moore in his dissenting opinion that the dismissal orders enterered below as to counts 3, 6, 7, 8, 9, 10, 11, 13, and 14 should be affirmed.' An examination of Judge Moore's dissenting opinion discloses however no "position taken by" Judge Moore with respect to the 9 counts in question except the statement he would affirm 'Judge Ryan's judgment in its entirety.'" "without mention or discussion of appellant's grounds for appeal."

Petitioner submits that the failure of the court below to grant the application for correction of its opinion constitutes a disservice both to this Court and petitioner. If the grounds for appeal of the Securities Exchange Act counts 8, 13 and 14 (Judge Dawson only referred to counts 8 & 13) are completely without merit it should be easy for so distinguished a court to articulate its reasons for ruling so in a few well-chosen sentences. Its failure so to do, both as to the libel counts and to the Securities Exchange Act counts unduly causes a petitioner to write a more extensive petition for certiorari, as here, in fear he may not have covered all possible unexpressed grounds for denial of his appeal. As it is, petitioner as well as this Court must remain in the dark as to which ground of Judge Dawson's for dismissal it found sound. As we show hereafter none is correct.

Count 14 alleges all the facts that Judge Dawson could not find merely by looking at counts 8 & 13.

Judge Dawson stated that petitioner "has alleged no facts sufficient to show any damage resulting to him personally by reason thereof" (the alleged violation of the S. E. C. pre-filing Rule X-14a-11(c)(1) and the alleged violation of Rule X-14a-9 prohibiting solicitations by means of "false and misleading statements"). Yet count 14 re-alleged all the statements of defamatory publication in the prior counts, all

the jurisdictional grounds, and further alleged they were part of "a continuing conspiracy... maliciously to defame plaintiff", "injured him in his reputation", "deprived him of earnings" and caused "plaintiff's appointment" as "consultant" to be "terminated." (32a-35a)

The district court's holding that petitioner should have sought injunctive relief and that his failure so to do deprives him of remedy in damages* is squarely in conflict with J. I. Case v. Borak, supra, which makes available "all necessary remedial relief". (377 U. S. at 435)

As this Court stated by quotation from Deckert v. Independence Shares Corp., 311 U. S. 282 (1940):

> "The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilitze any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." (377 U. S. at 433-434)

* See p. 22, supra.

The final ground of Judge Dawson for rejecting petitioner's claims determined an issue of fact without trial and improperly on a motion for summary judgment by defendant.

The court stated: "If there were any violation of the proxy rules, such violation cannot be said to be related in any way to the damages sought to be recovered by the plaintiff." (p. 22, supra)

The complaint alleges simultaneous violation of the pre-filing and false and misleading statement rule with the issuance of the defamatory statements. Thus it is an issue of fact whether his loss of employment followed from and would have been avoided had not the defamatory statements been issued. But the fact that the statements were proxy statements is undeniable in view of Judge Dawson's own finding in the related Alleghany case (218 F. Supp. 164) that they were "a great flurry of publicity apparently intended to affect the voting in the proxy contest for control of the corporation. (Id., p. 167, p. 18, supra).

Thus the statements were proxy statements, they explicitly identified petitioner as a target in the proxy contest and they have been adjudicated false and misleading. It is difficult to see what more relation petitioner should have alleged to establish his right to recovery under the Act, since this Court held in Borak that "It appears clear that private parties have a right under §27 to bring suit for violation of §14(a) of the Act... a right of action exists as to both derivative and direct causes." (377 U. S. at 430-431)

The only difference between the present case and Borak is that the latter related to damages upon the stock he held while the present case relates to damages to reputation for circulating in the words of the S. E. C. "(b) Material which...impugns personal reputation, or makes charges (of) illegal conduct ...without factual foundation." 17 C. F. R. §240.14a-9, note. (Emphasis supplied.)

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

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APPENDICES